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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 486

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, KENNETH POTTER, PETER E. MITCHELL and VERNE SCOGGINS, as members of and constituting said Commission,
Appellees.

Brief in Opposition to Motion to Dismiss or Affirm

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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, KENNETH POTTER, PETER E. MITCHELL and VERNE SCOGGINS, as members of and constituting said Commission,
Appellees.

Brief in Opposition to Motion to Dismiss or Affirm

A statement in opposition to jurisdiction and a motion to dismiss or affirm have been served by the Public Utilities Commission of the State of California and its individual members, appellees above named, herein collectively referred to as "the Commission." Appellant submits this brief in reply and opposition to that motion, as contemplated by Rule 7(3) of the Rules of this Court.

Appellant replies to various statements made by the Commission respecting the questions in this appeal, by summarily defining those questions. They are:

1. The validity, under the federal Constitution, of that portion of the Commission order requiring appellant to use self-propelled equipment, rather than non-self-propelled equipment, on a deficit-producing passenger train making a single daily trip of 88 miles in each direction, when the substitution of equipment is supported by absolutely no showing of public need, and will require an investment of some $450,000.[1]

2. The validity, under the federal Constitution, of that portion of the Commission order requiring appellant to continue to operate a deficit-producing passenger train for which there is no public need.

3. The validity, under the federal Constitution, of the limited scope of judicial review of constitutional factual questions accorded under the California statutory procedure, as construed by the California Supreme Court.[2]

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1. The Commission order does not specify the number of self-propelled cars which appellant would be required to acquire in order to make the prescribed substitution of equipment. The Commission, however, in its motion refers to "approximately three cars being sufficient" (p. 10 of typewritten manuscript). We do not necessarily accept this construction of the Commission order but in this brief will use that figure as providing a measure of the investment required: three cars at the estimated cost of $150,000 per car would require $450,000.

2. This appeal does not involve those portions of the Commission order requiring appellant to make certain studies respecting the establishment of automotive passenger service between San Francisco and Oakland or the improvement of its Oakland Pier terminal facilities. Nor does this appeal involve any question as to the power and authority of the Commission under the statutes and Constitution of the State of California, as alleged in the Commission's motion.

Questions "1" and "2" have a common legal basis (the alleged violation of the Commerce Clause of, and of the Due Process Clause of the Fourteenth Amendment to, the federal Constitution), but they are otherwise separate and distinct. Even assuming, *arguendo,* that the Commission order requiring the continued operation of the train is valid, we submit that the portion of the order requiring the substitution of self-propelled for non-self-propelled equipment is still invalid. The Commission in its motion, however, fuses these two questions and treats the validity of the portion of the order requiring the substitution of self-propelled equipment as ancillary and subordinate to the validity of the portion of the order requiring the continued operation of the train. Therefore, in order to bring into sharp focus the separate and distinct character of these two questions, we have listed them separately above and will so discuss them.

1. The Commission Order Requiring Appellant to Use Self-Propelled, Rather Than Non-Self-Propelled, Equipment Constitutes an Undue Burden on Interstate Commerce and Deprives Appellant of Its Property Without Due Process of Law.

The record contains absolutely no showing of any public need for the use of self-propelled equipment rather than non-self-propelled equipment on the train concerned, and yet the acquisition of that equipment, which appellant neither owns nor uses any place on its entire system, would require an investment of $450,000 and result in an operation at a substantial loss.

The California Supreme Court in its decision, however, states that the Commission, in concluding that self-propelled cars should be substituted for non-self-propelled cars "took the view" that such equipment "would materially expedite

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service between the terminal cities and would probably result in an increase in revenue."

As pointed out at length in appellant's jurisdictional statement, the Commission decisions contain no such statement, and the evidentiary facts do not support such a statement. In apparent recognition that this is so, the Commission in its motion does not even suggest that the use of self-propelled equipment would either expedite service or attract additional patrons so as to increase appellant's revenues.

The Commission in its motion rather refers only to the finding in the Commission decision that the "equipment ordered to be replaced" was "old, outmoded, and outdated." If the Commission thus intends to infer that the prescription of "self-propelled" equipment was justified because all non-self-propelled equipment is "old, outmoded, and outdated," that inference is contrary to the fact that the railroads in general, and appellant in particular, operate, on many trains, non-self-propelled equipment which is of the newest and most modern character. Since World War II appellant has acquired 189 new, lightweight, streamlined cars and 80 new diesel electric locomotive units for its passenger service. Therefore, the Commission's finding that the present equipment is old, outmoded and outdated provides no evidentiary basis for the Commission's conclusion that there is a public need for the substitution of self-propelled for non-self-propelled equipment. As pointed out in our jurisdictional statement, the absence of that public need is affirmatively revealed by the fact that not a single member of the traveling public—or, for that matter, any other person—appeared to urge the use of this type of equipment, and the Commission's own staff of experts, who introduced evi-

dence in the record, specifically refrained from making any definite recommendation as to what type of equipment should be used (T. 316-317).[3] Thus, the Commission order requiring appellant to use self-propelled rather than non-self-propelled equipment appears to rest, not on any public need, but rather on the mere whim and caprice of a bare three-member majority of the five-member Commission.

The Commission in its motion contends that the order in issue has no substantial impact upon appellant. That contention lacks merit. The self-propelled equipment which the Commission prescribes for use on one train making a daily trip of but 88 miles in each direction is incompatible with the passenger equipment used by appellant on its many interstate and other intrastate trains. That other equipment consists entirely of non-self-propelled equipment which may be readily interchanged to meet emergencies and changing traffic patterns. Self-propelled cars cannot be used to provide motive power to move non-self-propelled cars; their motive power can be used only if they are run separately or in trains consisting entirely of self-propelled cars (T. 301).

The Commission's order also has a substantial impact upon appellant because it requires an investment of $450,000 of new capital. The Commission intimates in its motion that this investment should not be regarded as a burden, because it would result in a reduction (though not an elimination) of appellant's operating loss on the train concerned. But this alleged benefit to appellant is to be weighed against the required outlay of the $450,000 of new capital for equipment which is to be used on one train making a daily trip of 88

3. Transcript and exhibit references "T." and "Ex." are to the record made before the Commission.

miles in each direction and which is incompatible with any of appellant's other passenger equipment. The determination of whether such a questionable investment of new capital will or will not inure to appellant's benefit is one that can best be determined by appellant's directors and officers, particularly when it appears without question that the public stands to receive no benefit from the investment. And, even if this investment of $450,000 were to be made, it is conceded by the Commission that the operation of the train with the new equipment would still result in appellant sustaining an out-of-pocket loss of at least $19,000 per year. Moreover, this substantial financial impact would be directed against appellant's already financially sick passenger business: appellant in 1950 had a system passenger deficit of $34,663,361 and an estimated deficit from all of its passenger service conducted within California of $10,291,801 (T. 332-333, 367).[4]

Such state regulatory action, unsupported by public need and having a substantial financial impact upon an interstate rail carrier, definitely constitutes an undue burden on interstate commerce. The Commission in its motion contends,

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4. In the last analysis, the dollar amount of the financial impact is not actually material in determining the constitutionality of the order. The following quotation from the dissenting opinion of Justice Frankfurter (joined in by the late Chief Justice Vinson, and also Justice Jackson and Justice Burton) in a tax case is just as applicable here in a case involving state regulation (*Memphis Natural Gas Co. v. Stone* (1948), 335 U.S. 80, 103-104):

> "Of course, a State tax on interstate commerce does not become a valid one merely because 'it's only a little one'. And even in these days, an unconstitutional exaction by a State of $3,400 is not *de minimis.*"

On the point thus discussed by Justice Frankfurter, there appears to have been no conflict between the views expressed and those of the majority.

however, that there can here be no undue burden on interstate commerce because the passenger train to which the Commission's order is directed has only an intrastate operation. But it is well established that state regulation of intrastate activities may constitute an undue burden on interstate commerce. This Court so recognized in *Colorado v. United States* (1926), 271 U.S. 153, that the furnishing of intrastate service at a deficit may lead to higher interstate rates and to a waste of a carrier's resources necessary to enable it to serve interstate commerce and therefore burden interstate commerce. The Court said (p. 163):

> "Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce."

See, also, to the same effect, *Davis v. Farmers Co-Operative Co.* (1923), 262 U.S. 312, 317, in which this Court held invalid, as an undue burden on interstate commerce, state action directly regulating no interstate commerce but only requiring an interstate carrier to submit to litigation by a non-resident plaintiff on a cause of action arising elsewhere. This general principle that an undue burden on interstate commerce may result from the regulation of intrastate activities by reason of the financial impact of that regulation has been specifically applied to orders of state commissions affecting only intrastate trains. *Chicago, B. & Q. R. Co. v. Illinois Com. Commn.* (D.C.N.D., Ill., 1949), 82 F. Supp. 368, 376; *Pennsylvania-Reading Sea. Lines v. Board of Pub. Util.* (1950), 5 N.J. 114, 74 A.2d 265, 272-274, cert. den. 340 U.S. 876.

As pointed out in appellant's jurisdictional statement, not only does the Commission's order violate the Commerce Clause of the federal Constitution in general, but it also violates the National Transportation Policy (49 U.S.C., preceding Sec. 1; 54 Stat. 899) in particular. That Congressional policy of promoting economical and efficient service and fostering sound economic conditions in transportation is clearly violated by state regulatory action requiring an interstate rail carrier to spend $450,000 for a specific type of equipment for which there is no public need when that equipment is to be used on a train operated at an out-of-pocket loss and is incompatible with the other equipment used by the carrier on its many other interstate and intrastate passenger trains. Contrary to the contentions advanced by the Commission in its motion, the National Transportation Policy enacted in 1940 does modify the pre-existing picture and limit the extent the states might otherwise validly burden interstate commerce. For this Court has specifically held that state laws which violate that policy or earlier similar declarations of policy must be stricken down as undue burdens on interstate commerce. *Southern Pac. Co. v. Arizona* (1945), 325 U.S. 761, 773, 783-784; *Davis v. Farmers Co-Operative Co., supra*, 262 U.S. 312, 317. Moreover, in *Chicago, B. & Q. R. Co. v. Illinois Com. Commn., supra*, 82 F. Supp. 368, 376, a three-judge federal district court held that a Commission order affecting a purely intrastate passenger train specifically violated the National Transportation Policy.

The Commission in its motion quotes from this Court's decision in *Alabama P. S. Commn. v. Southern Ry. Co.* (1951), 341 U.S. 341, as supporting its contention that the

National Transportation Policy affords no guide in determining whether state action invalidly burdens interstate commerce. Clearly, that decision is open to no such construction. Aside from the fact that the Court did not pass upon the constitutionality of the state regulatory order concerned, the carrier did not there urge that the order violated either the Commerce Clause in general or the National Transportation Policy in particular.

The same lack of public need for the substitution of self-propelled cars for non-self-propelled cars results in the Commission's order depriving appellant of its property without due process of law. As broad as the state police power may be, it cannot be exercised to require a carrier to make a substantial expenditure of money when that expenditure is supported by no public need but is the result only of the whim and caprice of state officials. In *Oregon R. & N. Co. v. Fairchild* (1912), 224 U.S. 510, this Court held that a state commission order requiring a railroad company to make a capital expenditure for the construction of a switch connection violated the Due Process Clause of the Fourteenth Amendment to the federal Constitution and was thus invalid because there was a lack of any public need for the construction.

If there were ever state regulatory action that was so unsupported by evidence and a rational basis as to be arbitrary, it is this action of the Commission in specifying that the cars used on the train concerned should be "self-propelled." Indeed, it would have been no more arbitrary if the Commission had ordered appellant to equip the train with cars having a green color or furnished with teakwood chairs, in the absence of any public need therefor.

2. The Commission's Order Requiring Appellant to Continue Operation of the Train, With Either Self-Propelled or Non-Self-Propelled Equipment, Constitutes an Undue Burden on Interstate Commerce and Deprives Appellant of Its Property Without Due Process of Law.

As demonstrated at length in appellant's jurisdictional statement, the evidence of record shows no public need for the continued operation of the train with either self-propelled or non-self-propelled equipment.

The only evidence received in the record which is referred to by the California Supreme Court in its opinion as showing a public need consists of a resolution of the City Council of Sacramento protesting the discontinuance of the train (Ex. 7), testimony by the Sacramento City Manager that he felt that the train should not be discontinued (T. 256), and a statement on behalf of the City of Richmond protesting the discontinuance of the train (T. 118). As stated in appellant's jurisdictional statement, "Such mere statements objecting to the discontinuance of the train and hopeful expressions that it will not be discontinued are not evidence of public need."

In apparent recognition that these protests have no evidentiary value, the Commission makes no reference to them in its motion. Instead, the Commission states:

> "* * * the operation in question is between the State Capital and one of the largest metropolitan areas in the second largest State in the Union, and operating through communities which have increased their population by 50% in the last ten years."

The relative importance of the points concerned is no evidence of any need for the train. Evidence of that need is, rather, the use made of the train by the public and the

availability of other transportation service between those cities. That other transportation service consists of appellant's 13 other daily trains in each direction, seven of which provide train service the entire distance between San Francisco and Sacramento, as well as the daily train service of the Western Pacific Railroad Company and frequent bus and airplane service.

Furthermore, the immateriality, on the question of public use and, hence, public need for the facilities, of the population increase in the past decade is shown by the evidence that the number of passengers using all of appellant's trains between San Francisco and Sacramento has since 1946 been continually decreasing by approximately 15 per cent per year (T. 265). It is also established by the evidence that improvements in the highway facilities for competing automobile and bus traffic have more than kept pace with the population growth. The studies of the Commission's own staff, placed in the record by the Commission, contain the following statements (Ex. 6, pp. 23, 24):

> "The Southern Pacific service is paralleled between San Francisco and Sacramento by an excellent highway, U. S. Route 40.
>
> * * * * * * *
>
> The highway is of at least four lane construction over almost its entire length.
>
> * * * * * * *
>
> This highway has been progressively improved during the past years so that today it is easier and faster to drive than it was at the close of the war in 1945, in spite of the increasing volume of automobile traffic."

The Commission, in discussing the question of public need, also makes, in effect, a plea of confession and avoid-

ance: the Commission contends that the reason the public does not use the train is that appellant has failed to modernize the train. This contention is devoid of evidentiary support and is contrary to the studies of the Commission's own staff, which candidly state (Ex. 6, p. 26):

> "It is our belief that the improvements in the highway and the corresponding increase in the utility of the private automobile has been a most important factor in the decline in rail patronage between the two cities [San Francisco and Sacramento]."

The common-carrier bus service between San Francisco and Sacramento, which is not only frequent but also faster than appellant can possibly provide, was also attributed by the Commission's staff as making appellant's train service no longer "acceptable to the traveling public" (T. 228). As stated by Public Utilities Commissioners Craemer and Potter in their dissent to the Commission order:

> "It is plain from the record that the company [appellant] is faced with a competitive situation which is most difficult and does not lend itself to ready solution. The rail service between San Francisco and Sacramento has two very serious natural disadvantages; one being the fact that trains have no direct means of access into the city of San Francisco but must rely upon either ferry boats or highway carriers connections in order to cross San Francisco Bay, and secondly, the alignment of the rail route traversed between Oakland Pier and Martinez is such as to compel restricted speed in operation. On the other hand the highway competitors, both passenger stages and automobiles, operate over a high-speed highway directly connecting the two cities."

While the Commission's motion contains the bald statement, "The record contains sufficient evidence to amply support the findings of the Commission," it makes no further reference to what this "sufficient evidence" is. Rather, the Commission suggests that it may have drawn that evidence from "its experience and informed judgment." This suggestion is contrary to the holdings of this Court that an administrative body cannot treat as evidence that which is not introduced as such, or, consistent with procedural due process, make findings of fact not supported by evidence of record. *Interstate Com. Commn. v. Louisville & N. R. Co.* (1913), 227 U.S. 88, 91-94; *United States v. Abilene & So. Ry. Co.* (1924), 265 U.S. 274, 286-290; *Northern Pac. Ry. Co. v. Dept. of Public Works* (1925), 268 U.S. 39, 44-45.

Appellees seek to avoid the result of the above decisions by citing *Market St. Ry. Co. v. Commission* (1945), 324 U.S. 548, 561-562, and *United States v. Pierce Auto Lines* (1946), 327 U.S. 515, 527-530. However, these two cases specifically recognize that an administrative body may never look beyond the record proper where "substantial prejudice is shown to result." *United States v. Pierce Auto Lines, supra,* 327 U.S. 515, 530. Appellant submits that substantial prejudice manifestly would result in this case, where the record so clearly reveals an absence of public need for the continued operation of the train, if the Commission were permitted to make a valid finding of public need on the basis of evidence which is neither in the record *nor even disclosed to the parties or the Court.*

The Commission in its motion attempts to de-emphasize the lack of public need for the continuation of the train by inferring that appellant is here attempting to take action

contrary to the doctrine that the incurrence of an out-of-pocket loss does not constitutionally prevent a State from requiring a rail carrier to render one particular service at an out-of-pocket loss. The Commission states:

> "To carry the contention of appellant to its logical conclusion, this Commission should permit the abandonment of *all* of appellant's intrastate passenger service, save only that small portion of it which, the record shows, earns its out-of-pocket costs, * * *."

Here the Commission misstates appellant's contention. It is not that the Commission's order is invalid merely because it requires the operation of a train at an out-of-pocket loss, but rather because it requires the operation, at an out-of-pocket loss, of a train *for which there is no public need.*

The same established principles which make the portion of the Commission's order requiring the substitution of self-propelled equipment a violation of the Commerce Clause of the federal Constitution and of the National Transportation Policy apply equally to that portion of the order requiring the continued operation of the train. These principles have been discussed, *supra,* pages 8 and 9.

Requiring a rail carrier to continue to operate a deficit-producing train for which there is no public need, in addition to constituting an undue burden on interstate commerce, deprives the carrier of its property without due process of law, in violation of the Fourteenth Amendment to the federal Constitution. In appellant's jurisdictional statement we cited a large number of decisions from other jurisdictions holding that state commission orders requiring the operation of deficit-producing passenger trains, were, in the absence of public need, in violation of the Fourteenth Amend-

ment, even though system operations were profitable.[5] These cases are all recent ones, which expressly take into account the transportation revolution wrought by the development of the motor-bus common carrier, the private automobile and improved highways, and they clearly establish that the California court's view is contrary to the almost unanimous weight of modern authority. The Commission seeks to minimize the effect of these decisions solely by citing a decision of the California Supreme Court[6] which holds that decisions from other jurisdictions under other statutes "are not helpful" in defining the powers of the California Commission. But the cited decision holds merely that rulings in other states as to the statutory power of other commissions under different statutes are not determinative of the statutory power of the California Commission under the different California statute, a question not presented in this appeal. That decision certainly does not hold that decisions in other jurisdictions construing the scope of the power of state regulatory commissions under the federal Constitution are not entitled to great weight in this Court when the power

5. *M-K-T R. Co. v. State* (1941), 189 Okla. 685, 119 P.2d 835, 840; *St. Louis-S. F. R. Co. v. State* (1950), 204 Okla. 432, 230 P.2d 709, 714-716; *Application of Chicago, B. & Q. R. Co.* (*Chicago, B. & Q. R. Co. v. Municipalities of Holdrege*) (1950), 152 Neb. 352, 41 N.W. 2d 157, 161; *Blease v. Charleston & W. C. Ry. Co.* (1928), 146 S.C. 496, 144 S.E. 233, 239; *Hessey v. Capital Transit Co.* (C.A. Md. 1949), 66 A.2d 787, 790; *Pennsylvania-Reading Sea. Lines v. Board of Pub. Util., supra*, 5 N.J. 114, 74 A.2d 265, 272, cert. den. 340 U.S. 876; *Delaware L. & W. R. Co. v. Van Santwood* (D.C., N.D. N.Y., 1914), 216 Fed. 252, 254; *Atlantic Coast Line R. Co. v. Pub. Serv. Commn.* (1948), 77 F. Supp. 675, 686; *Northern Pac. Ry. Co. v. Board of Railroad Commrs.* (D.C. Mont. 1942), 46 F. Supp. 340, 342; *Chicago, B. & Q. R. Co. v. Illinois Com. Commn., supra*, 82 F. Supp. 368, 377.

6. *San Diego and Coronado Ferry Co. v. Railroad Commn.* (1930), 210 Cal. 504, 511, 292 Pac. 640.

of the California Commission under the federal Constitution is squarely in issue. Since this Court is the final arbiter of the meaning of federal constitutional provisions, it is required, in the traditional exercise of its power to review state court decisions on federal constitutional questions, to select that position from among conflicting state court views which is deemed to be the proper one.

The Commission nevertheless contends that under this Court's decision in *Alabama P. S. Commn. v. Southern Ry. Co., supra,* 341 U.S. 341, and certain earlier decisions of this Court,[7] no issue under the federal Constitution arises where a state requires the continuation of railroad service at a financial loss. Aside from the fact that the decision in the *Alabama P. S. Commn.* case did not go to the merits of the constitutional controversy, the dicta contained therein fully support our position that the requirement of service at a loss violates due process in the absence of public need therefor. As the Court put it (341 U.S. 341, 347):

> "The problems raised by the discontinuance of trains 7 and 8 cannot be resolved alone by reference to appellee's loss in their operation but depend more upon the predominantly local factor of public need for the service rendered."

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7. The Commission cites *Missouri Pac. Ry. Co. v. Kansas* (1910), 216 U.S. 262; *Atlantic Coast Line R. Co. v. N. Car. Corp. Commn.* (1907), 206 U.S. 1; *United Fuel Gas Co. v. Railroad Commn.* (1929), 278 U.S. 300. It also refers to the decisions cited by Justice Frankfurter in his concurring opinion in the *Alabama P. S. Commn.* case, *supra,* 341 U.S. 341, 352, 353. These include, in addition to the above: *Chesapeake & O. Ry. Co. v. Pub. Serv. Commn.* (1917), 242 U.S. 603; *Puget Sound Traction Co. v. Reynolds* (1917), 244 U.S. 574; *Fort Smith Light & Traction Co. v. Bourland* (1925), 267 U.S. 330.

The other above-mentioned decisions cited by the Commission not only relate to an era before the automobile transportation revolution but are clearly distinguishable on their facts. As pointed out in *Atlantic Coast Line R. Co. v. Pub. Serv. Commn.* (1948), 77 F. Supp. 675, 685, they involve situations where the carrier was being required to perform merely an absolute duty rather than a relative duty. In that court's opinion the duty in those cases was absolute either because there was a definite public need for the service or because the carrier was bound by a franchise contractual obligation to provide a specified passenger service. In fact, in most of these cases the carrier proposed to avoid its contractual obligation by furnishing no passenger train service whatsoever between the particular points. Nothing of that sort exists here. There is no contractual obligation to continue to operate the train concerned; and even after the discontinuance of that train the public would still have available 13 daily trains in each direction, seven providing passenger service the entire distance between San Francisco and Sacramento.

3. The California Review Procedure, as Construed to Deprive Appellant of the Right of Independent Judicial Review Upon the Constitutional Factual Question of Public Need, Deprives Appellant of Due Process of Law.

As indicated in our jurisdictional statement, the California Supreme Court construed the California statutory procedure for judicial review of the Commission's decision, as depriving it of the right to exercise its independent judgment upon, and re-examine the evidentiary facts upon, the question of whether there was public need either for the self-propelled equipment or the train service. This question,

as we pointed out, is one of ultimate fact upon which all of our substantive constitutional rights depend—a so-called "constitutional fact" question. It is our contention that, under *Ohio Valley Water Co. v. Ben Avon Borough* (1920), 253 U.S. 287, and subsequent decisions of this Court,[8] such a construction of the California review procedure renders it invalid under the Due Process Clause of the Fourteenth Amendment.

The Commission contends that this rule, while never having been expressly overruled, has been devitalized and rejected by later cases. In support of this position it cites the following language from this Court's decision in *Alabama P. S. Commn. v. Southern Ry. Co., supra,* 341 U.S. 341, and the two other cases there mentioned:

> "The fact that review in the Alabama courts is limited to the record taken before the Commission presents no constitutional infirmity. . . . And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. *New York v. United States,* 331 U.S. 284, 334-336 (1947); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.,* 311 U.S. 570, 576 (1941)."

This contention by the Commission overlooks the distinction between the above rule and the separate but related

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8. *Ng Fung Ho v. White* (1922), 259 U.S. 276, 284; *Prendergast v. New York Telephone Co.* (1923), 262 U.S. 43, 50; *Tagg Bros. & Moorhead v. United States* (1930), 280 U.S. 420, 443-444; *Phillips v. Commissioner* (1931), 283 U.S. 589, 600; *Crowell v. Benson* (1932), 285 U.S. 22, 45-46; *State Corp. Commn. v. Wichita Gas Co.* (1934), 290 U.S. 561, 569; *St. Joseph Stock Yards Co. v. United States* (1936), 298 U.S. 38; *Baltimore & O. R. R. Co. v. United States* (1936), 298 U.S. 349.

rule enunciated in *Crowell v. Benson* (1932), 285 U.S. 22, 63-65. The former rule is that due process (under either the Fourteenth or Fifth Amendments) requires a court reviewing an order of an administrative body to exercise its independent judgment, although on the record made before the administrative body, upon questions of constitutional fact. The rule of *Crowell v. Benson*, on the other hand, is to the effect that in such a situation the reviewing court must go further and hold a complete trial *de novo*, not confining itself to the administrative record. This latter rule is based, not upon due process, but upon the federal doctrine of separation of powers. *Crowell v. Benson, supra*, 285 U.S. 22, 64; 41 Yale L. J. 1037, 1055 (1932); 46 Harv. L. Rev. 478, 482 (1933). The latter rule has been severely criticized, primarily because it has the effect of completely vitiating the efforts of the administrative body on this type of question. Dickinson, *Judicial Review of "Constitutional Fact,"* 80 Penn. L. Rev. 1055, 1061 (1932).

It is plain that this Court in its above statement in the *Alabama P. S. Commn.* case meant to reject only this latter rule and not the doctrine of independent judicial review. Thus, in the immediately preceding sentence the Court was at pains to point out that the Alabama courts had held that "judicial review calls for an independent judgment as to both law and facts when a denial of due process is asserted." This effectually removed any question under the independent judicial review doctrine from the case. Furthermore, since the Court prefaced its above remarks with the phrase "whatever the scope of review," it is evident that the Court did not intend to define the limits of such review or to depart from its previous pronouncements that judicial re-

view properly extended to an independent re-examination of the evidentiary facts respecting constitutional factual issues. In denying that under its decisions any right exists to "relitigate," the Court merely meant that a party can not properly insist upon a complete trial *de novo* upon evidence which it had not, but could have, introduced before an administrative body.

Such is the holding of *New York v. United States* (1947), 331 U.S. 284, 334-336, which is cited by the Court as authority for the above statement, and which is relied upon by the Commission. Such also appears to have been all that the Court actually held in the *Rowan & Nichols* case which is also cited by the Court. There an order of the Texas Railroad Commission with respect to oil proration, which was attacked as confiscatory, was held not to be violative of the Due Process Clause. While the Court did state (311 U.S. 576) that due process "does not require the feel of the expert to be supplanted by an independent view of judges," this was said in a situation where the lower federal court had thought itself compelled to grant a complete trial *de novo*, without even having the record of the administrative tribunal before it. Thus, the Court apparently meant merely that due process did not require application of the *Crowell v. Benson* trial *de novo* rule. Since that rule is founded on the doctrine of separation of powers between the federal judiciary and the federal executive branch, it would obviously have no application where the involved executive agency was in the state rather than the federal government so that separation of federal powers would not be involved. 46 Harv. L. Rev. 478, 481-482 (1932). Moreover, the observation should be read as related to the facts before the Court.

Throughout its decision the Court stressed the peculiarly thorny technical problems presented, and the fact that in this situation the administrative body had much more competence than the courts. A proration order involves much more scientific and technical competence than the ordinary constitutional factual question presented in the *Ben Avon* case (39 Mich. L. Rev. 438, 447 (1941)), or presented here.[9]

It is not our position that a court should not give proper weight, in passing upon a constitutional issue, to the findings of an administrative body of experts upon technical matters; that, in its deliberations, it may not respect the "feel of the expert." But this is not to say that when a constitutional issue turns upon the determination of a question of fact, the fact question will not be reviewed if there is any evidence to support an administrative determination thereof. The court below, in expressly disclaiming the function of an "arbiter" of such facts, failed to perceive that it thereby abdicated its function as a guardian of rights conferred by the Constitution, since constitutional principles can never be enforced in a vacuum unrelated to facts.

It is significant also, as indicating that this Court did not reject this doctrine of independent judicial review in either *New York v. United States* or the *Rowan & Nichols* case, that the New York Court of Appeals said in 1947, after those decisions:

> "The *Ben Avon* case, supra, has never been overruled; on the contrary the principle that where consti-

9. All that is said here also applies to an earlier case, *Railroad Commn. of Texas v. Rowan & Nichols Oil Co.* (1940), 310 U.S. 573, which is cited by the Commission, and which involves the same questions.

tutional rights of liberty or property are involved due process requires independent judicial determination of the constitutional question in the courts has been reaffirmed."[10]

A further indication that this Court has not abandoned and should not abandon the rule of the *Ben Avon* case, stems from its recent reaffirmance of the doctrine that it will itself independently re-examine evidentiary facts when constitutional questions hinge upon the propriety of ultimate conclusions drawn from those evidentiary facts and will not be bound by the findings of state courts thereon. *Oyama v. California* (1948), 332 U.S. 633, 636, and cases cited; *Niemotko v. Maryland* (1951), 340 U.S. 268, 271; *Southern Pac. Co. v. Arizona, supra,* 325 U.S. 761. Since this Court is thus necessarily bound at the ultimate appellate stage to re-examine independently evidentiary facts to safeguard constitutional rights, it logically follows that, when the constitutionality of state administrative action is challenged on a factual ground, such as in the present case, there should also be such a re-examination under the *Ben Avon* rule at an earlier stage by a state court. This is in the interest of the parties, since otherwise they would never be able to secure any judicial determination of the constitutionality of the administrative action without appealing to this Court. It also is in the interests of efficient administration of justice, because it would eliminate some appeals to this Court, and would give this Court the benefit of the state court's preliminary performance of the same task of independently re-

10. *Staten Island Edison Corp. v. Maltbie* (1947), 296 N.Y. 374, 73 N.E. 2d 705, 707.

examining the evidence which it must, itself, ultimately perform.

It seems unthinkable that this Court would now depart from a rule so fundamental to American ideals of freedom from executive tyranny as the doctrine of independent judicial review of facts upon which constitutional rights depend. Essentially this doctrine is based on the theory that it would be a severe infringement of individual liberty for a legislative or administrative agency, which is engaged in laying down or enforcing the law, also to arrogate unto itself the final power to decide the very constitutional validity of its action. 32 Ill. L. Rev. 50, 53 (1937); 39 Mich. L. Rev. 438, 440 (1941). The necessity for this rule in order to protect constitutional rights is well explained by this Court in *St. Joseph Stock Yards Co. v. United States, supra*, 298 U.S. 38, 51-52:

> "When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these [constitutional] limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation."

The danger inherent in rejecting this rule is just as apparent now as it was in 1931 to Chief Justice Hughes, when he said:

> "The power of administrative bodies to make findings of fact which may be treated as conclusive, if there

is evidence both ways is a power of enormous consequence. An unscrupulous administrator might be tempted to say 'Let me find the facts for the people of my country, and I care little who lays down the general principles.'" (New York Times, Feb. 13, 1931, p. 18; quoted in 46 Harv. L. Rev. 478, 490-491 (1933).)

For all of the reasons here stated, it is respectfully submitted that the motion to dismiss or affirm should be denied, and probable jurisdiction noted.

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